

Masthead Logo

Santa Clara Law Review

Volume 59 | Number 1

Article 5

4-5-2019

UNPACKING THE LOOT BOX: HOW GAMING'S LATEST MONETIZATION SYSTEM FLIRTS WITH TRADITIONAL GAMBLING METHODS

David J. Castillo

Follow this and additional works at: <https://digitalcommons.law.scu.edu/lawreview>

Part of the [Law Commons](#)

Recommended Citation

David J. Castillo, Case Note, *UNPACKING THE LOOT BOX: HOW GAMING'S LATEST MONETIZATION SYSTEM FLIRTS WITH TRADITIONAL GAMBLING METHODS*, 59 SANTA CLARA L. REV. 165 (2019).

Available at: <https://digitalcommons.law.scu.edu/lawreview/vol59/iss1/5>

This Case Note is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com, pamjadi@scu.edu.

UNPACKING THE LOOT BOX: HOW GAMING'S LATEST MONETIZATION SYSTEM FLIRTS WITH TRADITIONAL GAMBLING METHODS

*David J. Castillo**

TABLE OF CONTENTS

I. Introduction.....	166
II. Background.....	166
A. The Increasing Monetization of Video Games.....	166
1. Overwatch	169
2. Star Wars Battlefront II	172
3. The General Controversy	175
B. Internet Gambling Laws	179
1. Wire Act	180
2. Unlawful Internet Gambling Enforcement Act	181
3. Proposed Bills	182
III. Identification of the Legal Problem.....	183
IV. Analysis.....	183
A. Elements	183
1. Consideration	185
2. Chance.....	187
3. Prize.....	189
B. The Difficulty of Regulating Loot Boxes on the Federal Level.....	192
C. Does an Issue Even Exist?	193
V. Proposal	195
A. Legislation	195
1. Foreign Laws.....	195
B. Self-Regulation	197
1. The Entertainment Software Rating Board	197
2. Public Pressure	198
VI. Conclusion.....	201

* B.A. English, Marquette University; J.D. Santa Clara University. I wish to thank the editorial board from Santa Clara Law Review Volume 58, specifically my mentor Hillary Blamey, for their guidance and assistance with this Note.

I. INTRODUCTION

The slow nature of its laws and the inability to account for technology have left the United States in a poor position to address the monetization of video entertainment, specifically retail video games.

Since the landmark First Amendment case of *Brown v. Entertainment Merchants Association*,¹ the moral controversy around violent video games has, for the most part, been settled. But now a new moral controversy has taken form. The cries of, “think of the children!” are still being made, however, this new concern has nothing to do with the artistic content of a video game. Rather, the new debate in the video game industry concerns real-life monetary transactions seeping into what were, for the most part, standalone products. A specific monetary system that has received substantial coverage from both the gaming community and the mainstream media is the “loot box” system.

This Note will examine whether loot boxes constitute gambling and whether the federal government is in a position to regulate them. It will examine this issue under the frame of two games: Blizzard’s *Overwatch* and Electronic Arts’² *Star Wars: Battlefront II*. First, this Note will explore the history of monetization in modern video games, as well as various applicable federal laws. Second, this Note will develop a working general definition of gambling, and apply each element to *Overwatch* and *Star Wars: Battlefront II*’s monetization systems, ultimately arriving at the conclusion that while they share characteristics with gambling, they would not be treated as such in a current court of law. Third, this Note will explain the difficulty of enforcing federal law on these monetization systems. Finally, this Note will propose solutions for regulating loot boxes using federal and international law as a background, while also detailing the benefits of industry self-regulation.

II. BACKGROUND

A. *The Increasing Monetization of Video Games*

The video game industry, once seen as nothing more than a niche hobby, has exploded into a major media industry. While an exact figure is not yet available, the global games market is estimated to have grossed

1. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011). In a 7-2 decision, the Court invalidated a California law banning the sale of violent video games to minors. More significantly, the Court held that First Amendment protections extended to video games.

2. For convenience, “Electronic Arts” will be referred to as “EA” throughout the rest of the Note.

between \$105 billion and \$108 billion.³ The digital video games market on computer and mobile is expected to earn \$132 billion in total revenue by 2021.⁴ In 2016, the videogame industry contributed \$11 billion to the United States GDP.⁵ The demographics of the industry have changed as well, with an increasing amount of gamers identifying as female.⁶ Modern AAA⁷ video games now reach sales once thought to belong to blockbuster movies. For example, the highest grossing game of 2017, *Call of Duty: WWII*, earned over \$1 billion by the end of the year.⁸

Yet despite the explosive growth of the industry, many companies find themselves struggling against rising development costs.⁹ The demand for greater graphics and increasing marketing costs have forced many developers to either sacrifice production quality or allow themselves to be absorbed by larger studios.¹⁰

To offset the rising costs, developers have employed numerous ways through which they can gain additional revenue.¹¹ Many of these techniques involve the use of the Internet as a digital distribution platform to provide content after a game has launched. An early example

3. See *Market Brief—Global Games 2017: The Year to Date*, SUPERDATA RES. <https://www.superdataresearch.com/market-data/market-brief-year-in-review/> (last visited Jan. 4, 2018); Emma McDonald, *The Global Games Market Will Reach \$108.9 Billion in 2017 With Mobile Taking 42%*, NEWZOO (Apr. 20, 2017), <https://newzoo.com/insights/articles/the-global-games-market-will-reach-108-9-billion-in-2017-with-mobile-taking-42/> (last visited Jan. 4, 2018).

4. Luke Graham, *Digital Games Market to See Sales Worth \$100 Billion This Year: Research*, CNBC (Feb. 15, 2017), <https://www.cnbc.com/2017/02/15/digital-games-market-to-see-sales-worth-100-billion-this-year-research.html>.

5. Kevin Anderson, *The Business of Video Games: A Multi Billion Dollar Industry [Infographic]*, FORBES (Apr. 29, 2017), <https://www.forbes.com/sites/kevinanderton/2017/04/29/the-business-of-video-games-a-multi-billion-dollar-industry-infographic/#18761c1a6d27>.

6. Gail Sullivan, *Study: More Women than Teenage Boys are Gamers*, WASHINGTON POST (Aug. 22, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/08/22/adult-women-gamers-outnumber-teenage-boys/?noredirect=on&utm_term=.336f48ea998d..

7. For the purposes of this Note, the term “AAA” generally refers to the games with the highest budgets and marketing promotions.

8. Eddie Makuch, *Call of Duty: WW 2 Passes \$1 Billion in Worldwide Sales*, GAMESPOT (Dec. 20, 2017) <https://www.gamespot.com/articles/call-of-duty-ww-2-passes-1-billion-in-worldwide-sa/1100-6455775/>.

9. See *Why Have Video Game Budgets Skyrocketed in Recent Years?*, FORBES (Oct. 31, 2016), <https://www.forbes.com/sites/quora/2016/10/31/why-have-video-game-budgets-skyrocketed-in-recent-years/#77ce61b53ea5>.

10. *Id.*

11. See Jacob Kleinman, *Bethesda Founder Christopher Weaver on the Past, Present and Future of Video Games*, ROLLING STONE (Dec. 26, 2017), <https://www.rollingstone.com/glixel/features/bethesda-founder-christopher-weaver-on-video-games-w514666> (In which the founder of Bethesda, one of the most prominent AAA video game companies, explained that “[p]layers may have to absorb the increasing costs of creating AAA games to allow publishers to remain profitable”).

of such a practice would be Cavedog's *Total Annihilation*, a real-time strategy game that offered players a new virtual army unit each month.¹² Many games in the mobile-market utilized what is known as the free-to-play model, or "F2P."¹³ Under this model, a video game is released for free, while users may continue to either invest more time into a game to access its content, or pay fees to speed up the process.¹⁴ The mobile game *Clash of Clans*, with a reported player count in the tens of millions in 2016, is an example of the F2P model.¹⁵

With the rise of free-to-play and a lack of focus on developing expansion packs, a new monetization method emerged: microtransactions.¹⁶ A microtransaction is a business model wherein "virtual goods, such as characters, costumes, or weapons, can be purchased online for small sums of real currency."¹⁷ The practice has proven extremely successful from an economic standpoint; the most recent statistics cite a revenue of \$22 billion on the PC¹⁸ alone.¹⁹ With such large prospective revenue, many large publishers are choosing to prioritize games that offer chances for monetization options.²⁰

There are numerous ways through which companies may monetize a video game through microtransactions. The practice was popularized through Microsoft's Xbox Live online network for the Xbox 360 game console.²¹ Using a points system, this model would allow players to

12. See List of post-release downloadable units from the game *Total Annihilation*, Units, CAVEDOG, https://web.archive.org/web/20010330073657/http://www.cavedog.com/totala/dwnlds_frame.html (last visited Jan. 17, 2018).

13. See Nick Day, *Monetizing Mobile Gaming*, TECHCRUNCH (Feb. 28, 2016), <https://techcrunch.com/2016/02/28/mobile-gaming-trends/>.

14. See *id.*

15. See Eddie Makuch, *100 Million People Play Clash of Clans Dev's Games Every Day*, GAMESPOT (Mar. 7, 2016), <https://www.gamespot.com/articles/100-million-people-play-clash-of-clans-devs-games-/1100-6435433/>.

16. See Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, US GAMER (Oct. 11, 2017), <https://www.usgamer.net/articles/the-history-of-gaming-microtransactions-from-horse-armor-to-loot-boxes>.

17. Matt Fernandez, *'Star Wars' Video Game Microtransactions Ignite Controversy*, VARIETY (Nov. 23, 2017), <http://variety.com/2017/digital/news/star-wars-video-game-controversy-microtransaction-loot-box-1202621913/>.

18. The "PC" platform refers to videogames released on Personal Computers.

19. See Samuel Horti, *Revenue from PC Free-to-Play Microtransactions has Doubled Since 2012*, PC GAMER (Nov. 26, 2017), <http://www.pcgamer.com/revenue-from-pc-free-to-play-microtransactions-has-doubled-since-2012/>.

20. Robert Purchase, *"I've Seen People Literally Spend \$15,000 on Mass Effect Multiplayer Cards," Former BioWare Speaks Out Against EA's Monetisation of Games*, EUROGAMER (Oct. 23, 2017), <http://www.eurogamer.net/articles/2017-10-23-manveer-heir-bioware-mass-effect-ea-monetisation>.

21. Brian Crecente, *What are DLC, Loot Boxes and Microtransactions? An Explainer*, ROLLING STONE (Nov. 28, 2017) <https://medium.com/rollingstone/what-are-dlc-loot-boxes-and-microtransactions-an-explainer-586312381158>.

purchase specific items of content, often in the five-dollar range, rather than pay for a whole expansion.²² The practice proved incredibly profitable and companies began putting more and more small-sized content onto online marketplaces.²³ To use an example, EA's *Mass Effect 2*, a science-fiction themed roleplaying game, sells virtual weapons, armor, character outfits, and even storyline missions on its online marketplace using a virtual point system.²⁴

One of the most recent and well-known implementations of microtransactions are loot boxes. Loot boxes are virtual boxes that are purchased using either in-game currency or real currency.²⁵ The contents of the boxes are random, incentivizing players to keep playing to obtain the boxes containing content they actually want.²⁶ With origins in Asian online-multiplayer games, loot boxes proved lucrative and eventually made their ways to Western markets.²⁷

Loot boxes have become commonplace in large AAA titles.²⁸ While the basic concept remains the same, there are many ways in which they have manifested. A case-study of a few games will provide a greater understanding of the loot box system and its reception among the gaming community. For the purposes of this paper, the two games that will be examined are Blizzard's *Overwatch* and EA's *Star Wars Battlefront II*. The two games were chosen for their popularity and the fact that at least one gambling authority has investigated both of them.²⁹

1. *Overwatch*

One of the most well-known instances of the loot boxes model is found in Blizzard's *Overwatch*. Released in May 2016, *Overwatch* has

22. See, e.g., *A Little Moolah Goes a Long Way*, REUTERS BUS. (Mar. 20, 2005), <https://www.wired.com/2005/03/a-little-moolah-goes-a-long-way/>.

23. Crecente, *supra* note 21.

24. *Downloadable Content*, MASS EFFECT 2, <http://masseffect.bioware.com/me2/info/dlc/> (last visited Jan. 10, 2017).

25. Andrew E. Freedman, *What are Loot Boxes? Gaming's Big New Problem, Explained*, TOM'S GUIDE (Feb. 27, 2018), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

26. *Id.*

27. Jared Newman, *How Loot Boxes Led to Never-Ending Games (And Always-Playing Players)*, VARIETY (Nov. 14, 2017), <https://variety.com/2017/gaming/opinion/loot-box-evolution-1203048057/>.

28. Alex Avard, *Video Games Have a Loot Box Fetish, and it's Starting to Harm the Way We Play*, GAMESRADAR (Oct. 10, 2017), <http://www.gamesradar.com/loot-boxes-shadow-of-war/> (explaining that each of the seven AAA titles the author played contained some form of loot boxes).

29. Eddie Makuch, *Battlefront 2, Overwatch Being Investigated by Gambling Authority in Belgium*, GAMESPOT (Dec. 5, 2017), <https://www.gamespot.com/articles/battlefront-2-overwatch-being-investigated-by-gamb/1100-6454989/>.

a current player count of approximately 35 million people.³⁰ *Overwatch* is a first-person shooter³¹ that allows players to select “heroes” and fight in the game’s locations (“maps”) using the heroes they selected.³² Because *Overwatch* is an online-multiplayer game, there is no “ending” to the game—players may continue to play it so long as the servers are running.³³ This method of progression has made *Overwatch* more akin to a “service” rather than a traditional game, in which all of the content is available to the player upon purchase of the game, barring post-launch expansion packs and downloadable-content.³⁴

The standard price for *Overwatch* is \$39.99 on the PC, however, versions available for consoles,³⁵ as well as the PC’s “Game of the Year” edition, cost \$59.99.³⁶ Despite the price for retail, *Overwatch* makes use of the loot box system that was mostly found in free-to-play games on previous occasions. Loot boxes are the central part of *Overwatch*’s progression system. The lowest price for these boxes is \$1.99 for two items; the most expensive price is \$39.99, which grants the player fifty items.³⁷ *Overwatch*’s own website describes loot boxes as containing “random items that can be used to customize the appearance of your heroes and personalize the way you express yourself in-game.”³⁸ Each loot box contains items of different rarities, including “Common, Rare Epic, or Legendary.”³⁹ The items gained through the loot boxes do not affect actual gameplay, meaning that the only difference between a character with a loot box item and a character without is solely aesthetic and geared towards player customization.⁴⁰ Loot boxes do not need to be bought through Blizzard’s store, they may be earned through ordinary

30. *Overwatch* (@PlayOverwatch), TWITTER (Oct. 16, 2017, 7:00 AM), <https://twitter.com/PlayOverwatch/status/919925924769906688/photo/1>.

31. For the purposes of this Note, a “first person shooter” refers to a game in which the player interacts with the game in a first-person perspective, often with an emphasis on gunplay.

32. See *OVERWATCH*, <https://playoverwatch.com/en-us/game/overview> (last visited Jan. 17, 2018).

33. See generally *Welcome to Overwatch*, *OVERWATCH*, <https://playoverwatch.com/en-us/game/overview> (last visited Jan. 22, 2018) (explaining how the progression system allows level gains and player customization options).

34. See Newman, *supra* note 27 (detailing the “games as service” model as a way to continually bring content to players).

35. The consoles that support *Overwatch* are Microsoft’s Xbox One, and Sony’s Playstation 4.

36. *Overwatch*, BLIZZARD, <https://us.shop.battle.net/en-us/product/overwatch> (last visited Jan. 22, 2018).

37. *Shop*, BLIZZARD, <https://us.shop.battle.net/en-us/product/overwatch-loot-box> (last visited Jan. 27, 2018).

38. *Id.*

39. *Id.*

40. See *id.*

gameplay.⁴¹ Players can also earn loot boxes by leveling up their profiles through matches, playing a certain amount of games in “Arcade Mode,” and through special seasonal events.⁴² Most of the items to be gained from loot boxes are also purchasable using the in-game currency, which players may earn from loot boxes, or from having a duplicate of a customization item.⁴³

According to *Overwatch*’s developers, the revenue gained from loot boxes would provide players with free content that was often charged in other large releases, such as maps, characters, and game modes.⁴⁴ It appears that the developer’s rationale has been warmly received from both a critical and a financial perspective. On Metacritic, a popular review aggregation site, *Overwatch* possesses a score of 91/100, or “Universal Acclaim” based on sixty-three critics.⁴⁵ Most reviewers have not shown an indication of dissatisfaction with the loot box system; noting that the boxes are unlocked at a decent pace, thus reducing the need to pay with real-world currency.⁴⁶ However, not every outlet has been positive on the practice, and the locking of certain customization items behind seasonal events appears to be a particular ire among players.⁴⁷ But any frustration with the system seems to be in the minority; according to Blizzard’s Q1 2017 financial statement, *Overwatch* generated \$1.386 billion of the publisher’s \$1.726 billion total net revenue in that quarter, or eighty percent.⁴⁸

41. *Id.*

42. See Shop, BLIZZARD, <https://us.shop.battle.net/en-us/product/overwatch-loot-box> (last visited Jan. 27, 2018).

43. *Id.*

44. Newman, *supra* note 27.

45. *Overwatch*, METACRITIC, <http://www.metacritic.com/game/pc/overwatch> (last visited Jan. 23, 2018).

46. Compare Daniel Friedman, *Are Overwatch’s Loot Boxes Worth Your Money?*, POLYGON (May 26, 2016), <https://www.polygon.com/2016/5/26/11785084/overwatch-loot-system-guide> (“You probably don’t need to buy *Overwatch* loot with real money.”), with Daniel Friedman, *Destiny 2 Should Steal Overwatch’s Loot Box System or Shut Down the Eververse*, POLYGON (Jan. 8, 2018), <https://www.polygon.com/2018/1/8/16855180/overwatch-skins-loot-box-prices-destiny-2-crate-analysis> (“*Overwatch* gives you a loot box roughly every 90 minutes you play, with no cap.”), with Vince Ingenito, *Overwatch Review*, IGN (May 27, 2016), <http://www.ign.com/articles/2016/05/28/overwatch-review> (“Matchmaking is swift and reliable, and the cosmetic unlockables are surprisingly charming and come at a pretty decent pace without paying for extra loot packs.”).

47. See Natalie Clayton, *Overwatch’s Loot Box System isn’t as Innocent as it Seems*, PCGAMESN (Oct. 16, 2017), <https://www.pcgamesn.com/overwatch/loot-box-crate> (noting the difficulty of obtaining particular skins).

48. Jeff Grubb, *With \$1 Billion in Revenue, Overwatch is Blizzard’s Fastest-Growing Franchise*, VENTUREBEAT (May 4, 2017), <https://venturebeat.com/2017/05/04/with-1-billion-in-revenue-overwatch-is-blizzards-fastest-growing-franchise/>.

2. *Star Wars Battlefront II*

The most infamous implementation of the loot box model, or at least the most infamous in 2017, is found in the game *Star Wars Battlefront II* (hereinafter *SWBFII*), published by Electronic Arts Inc. and developed by EA Digital Illusions CE AB (hereinafter DICE). *SWBFII* is a first-person shooter taking place in the popular *Star Wars* franchise.⁴⁹

SWBFII is not EA's first foray into the realm of loot boxes. The company is often credited for proliferating the system in their 2012 game, *Mass Effect 3*.⁵⁰ A form of loot boxes were also found in the popular FIFA games developed by EA, in which players could collect trading cards to build virtual clubs in a mode called "Ultimate Team."⁵¹ The model proved successful, with FIFA's Ultimate Team in particular generating \$800 million in net revenue annually.⁵²

Like *Overwatch*, the developers of *SWBFII* claimed that future downloadable content, such as weapons, maps, and characters, would be free.⁵³ Also similar to *Overwatch* was the game's progression system, which was tied to a loot crate model.⁵⁴ Through this particular model, known as "Star Cards," players were "able to modify [their] favorite heroes and troopers to [their] specifications, creating ever-more powerful and flexible combinations."⁵⁵ Players could receive Star Cards through completing in-game challenges and quests, and through loot boxes.⁵⁶ The items to be earned through the boxes came in different rarities, again, like *Overwatch*.⁵⁷ Unlike, *Overwatch*'s loot boxes, Star

49. About, EA, <https://www.ea.com/games/starwars/battlefront/battlefront-2/about> (last visited Jan. 15, 2018).

50. Newman, *supra* note 27.

51. *Id.*

52. Matthew Handrahan, *EA's Ultimate Team Now Worth \$800 Million Annually*, GAMESINDUSTRY.BIZ (Mar. 1, 2017), <http://www.gamesindustry.biz/articles/2017-03-01-eas-ultimate-team-now-worth-USD800-million-annually>.

53. See Adam Rosenberg, *It Looks Like 'Star Wars: Battlefront II' Will Ditch the Season Pass*, MASHABLE (Apr. 15, 2017), <https://mashable.com/2017/04/15/star-wars-battlefront-2-season-pass-no-more/#moiyCXfSogq4>; see also Aiden Strawhun, *Star Wars Battlefront 2's DLC Plans Hinted in Origin Store Page*, GAMESPOT (June 10, 2017), <https://www.gamespot.com/articles/star-wars-battlefront-2s-dlc-plans-hinted-in-origi/1100-6450714/>.

54. Sherif Saed, *Star Wars Battlefront 2: Breaking Down Star Cards, Weapon Unlocks, Card Levels, and the Rest of the Game's Convolved Systems*, VG 24/7 (Nov. 14, 2017), <https://www.vg247.com/2017/11/14/star-wars-battlefront-2-breaking-down-star-cards-weapon-unlocks-card-levels-and-the-rest-of-the-games-convolved-systems/>.

55. *Star Cards and Crates Add New Progression Options*, EA, <https://www.ea.com/games/starwars/battlefront/battlefront-2/news/star-wars-battlefront-ii-star-cards-1> (last visited Jan. 27, 2018).

56. *Id.* (Note that in this game, EA refers to the boxes as "Crates").

57. *Id.*

Cards had in-game functions, such as enhancing a player's character, with the enhancements growing stronger with the rarity of the Star Card.⁵⁸ These effects could be substantial, and a player with a rarer Star Card would have a significant advantage over a player without the Card.⁵⁹ Star Cards were also the only way for a player to level up their characters.⁶⁰ Thus, in order to gain an advantage and progress their character, a player had to either play the game for a substantial amount of time to earn a loot box, or use real-world currency to purchase "Crystals," which may be used to purchase loot boxes.⁶¹

Despite an extensive marketing campaign, the game quickly became infamous for its particular implementation of the loot box system.⁶² With the release of its open-beta on October 10, 2017, players began to criticize the use of Star Cards and loot boxes.⁶³ In response, EA announced that the rarest Star Cards, and thus the most powerful, would not be found in the game's loot boxes on October 12, 2017.⁶⁴ Despite EA's assurances, the full release and players' exposure to the full extent of the microtransaction system led to unfavorable reviews.⁶⁵ On Metacritic, *SWBFII* currently has a score of "68/100" based on sixty-one critics, indicating "Mixed or Average Reviews."⁶⁶

58. *Id.*

59. Sherif Saed, *Let's Not Mince Words; Star Wars Battlefront 2 Loot Boxes are Pay-to-Win*, VG 24/7 (Oct. 11, 2017), <https://www.vg247.com/2017/10/11/lets-not-mince-words-star-wars-battlefront-2-loot-boxes-are-pay-to-win/>. The example used in this article refers to "rate-of-fire" and health bonuses. "Rate-of-fire" refers to how fast a player may fire their in-game weapon, and "health" refers to the health a player's character possesses before being killed in-game. The writer noted that certain Star Cards could provide up to a fifty percent bonus.

60. *Id.*

61. Saed, *Star Wars Battlefront 2*, *supra* note 54.

62. Fernandez, *supra* note 17.

63. Gita Jackson, *A Guide to the Endless, Confusing Star Wars Battlefront II Controversy*, KOTAKU (Nov. 21, 2017), <https://kotaku.com/a-guide-to-the-endless-confusing-star-wars-battlefront-1820623069> ("The specter of microtransactions hovers over *Battlefront II*.").

64. *Thank You for Playing the Beta*, EA, <https://www.ea.com/games/starwars/battlefront/battlefront-2/news/thank-you-beta> (last visited Jan. 28, 2017) ("As a balance goal, we're working towards having the most powerful items in the game only earnable via in-game achievements.").

65. See Andrew Reiner, *Star Wars Battlefront II*, GAMEINFORMER (Nov. 14, 2017), http://www.gameinformer.com/games/star_wars_battlefront_ii/b/xboxone/archive/2017/11/14/star-wars-battlefront-ii-review-the-dark-side-of-gaming.aspx ("[A]t this point in time, this predatory microtransaction model Force-chokes *Battlefront II*'s experience."); see Heather Alexandra, *Star Wars Battlefront II Lets You Pay Real Money For Multiplayer Advantages*, KOTAKU (Nov. 10, 2017), <https://kotaku.com/star-wars-battlefront-ii-lets-you-pay-real-money-for-mu-1820333246> ("You can quite literally pay money for statistical advantages in *Star Wars Battlefront II*.").

66. *Star Wars Battlefront II*, METACRITIC, <http://www.metacritic.com/game/playstation-4/star-wars-battlefront-ii> (last visited, Jan. 23, 2017).

News of the controversy left the confines of hobby-websites and YouTube and subsequently found coverage in mainstream news outlets such as BBC.⁶⁷ EA's initial efforts to stem the outrage resulted in further criticism, with news outlets focusing on an EA community representative's comments on the website Reddit in particular.⁶⁸ Unique among all the loot box models is the fact that EA's monetization policy led to negative financial consequences.⁶⁹ Due to the public outcry, EA's share price dropped by 2.5 percent on the game's launch day, and Wall Street analysts expressed worry over its potential profitability.⁷⁰

In April of 2018, EA revamped *SWBFII*'s progression system by removing ability-granting loot boxes.⁷¹ In the new update, the "Crystals" could now be used to purchase character skins, rather than Star Cards.⁷² Thus, while microtransactions still exist within the game, they are now in the form of direct purchases instead of loot boxes.⁷³ Some outlets have praised the change, although others have still complained about the time players must invest in order to unlock content.⁷⁴

67. *Call to Regulate Video Game Loot Boxes Over Gambling Concerns*, BBC (Nov. 24, 2017), <http://www.bbc.com/news/technology-42110066>.

68. EACommunityTeam, REDDIT, (Nov. 12, 2017), https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/dppum98/?context=3 (The most infamous portion of the comment reads: "The intent is to provide players with a sense of pride and accomplishment for unlocking different heroes.").

69. Andy Chalk, *Electronic Arts Stock Sheds \$3 Billion in Value After Battlefront 2*, PC GAMER (Nov. 28, 2017), <https://www.pcgamer.com/electronic-arts-stock-sheds-3-billion-in-value-after-battlefront-2/>.

70. Tae Kim, *Wall Street Is Freaking Out as EA Caves Again to Social Media Outrage Over its 'Star Wars' Game*, CNBC (Nov. 17, 2017), <https://www.cnbc.com/2017/11/17/wall-street-is-freaking-out-as-ea-caves-again-to-social-media-outrage-over-its-star-wars-game.html>.

71. Heather Alexandra, *Battlefront II's New Microtransactions are an Improvement, but Unlocks are Still Grindy*, KOTAKU (Apr. 18, 2018), <https://kotaku.com/battlefront-ii-s-new-microtransactions-are-an-improvemen-1825363356>.

72. *Id.*

73. *Id.*; see also Heather Alexandra, *Star Wars: Battlefront II, Six Months Later*, KOTAKU (Apr. 19, 2018), <https://kotaku.com/star-wars-battlefront-ii-six-months-later-1825392548>.

74. See Alexandra, *Battlefront II's New Microtransactions*, *supra* note 71 ("The shift away from loot boxes, which are designed to exploit impulsive players, is also welcome. It's still not great though. The skins are pretty underwhelming and their cost adds another steep grind to the game."); see Mike Minotti, *Star Wars: Battlefront II is Fun After Sending Old Lootbox System Down the Garbage Chute*, VENTUREBEAT (Apr. 2, 2018), <https://venturebeat.com/2018/04/02/i-finally-played-star-wars-battlefront-ii-and-its-pretty-fun/>.

3. The General Controversy

The trend towards including loot boxes in fully-priced games has not been met without backlash by the game-playing community.⁷⁵ The loot box controversy is distinguishable from the controversies surrounding the video game industry that came before it in one major way: the public furor originates mostly from within the gaming community itself, not outside parent groups or legislators.⁷⁶

The industry is certainly no stranger to moral panics and appeals to the judicial and legislative systems.⁷⁷ Most notably, the violent content of several games has led to calls for the industry, or even the government, to intervene.⁷⁸ Outside of the violence issue, the majority of legislation surrounding the video game industry concerns intellectual property law and patent law, especially issues over likeness.⁷⁹ However, the actual monetization policies of video games has largely been ignored by the government, leading to a system wherein no formal regulations exist.⁸⁰ Certain schemes, such as the customizable weapon “skins” in the popular game *Counter Strike* received attention when it was discovered that they were used in third-party gambling cites.⁸¹ But loot boxes appear to be the first widespread call for some form of regulation.

75. See Tom Hoggins, *Star Wars Battlefront 2 Loot Box Furore Could Mark a Turning Point for the Games Industry*, THE TELEGRAPH, (Nov. 17, 2017), <http://www.telegraph.co.uk/gaming/features/star-wars-battlefront-2-loot-box-furore-could-mark-turning-point/>; see generally Daniel Friedman, *Destiny 2 Should Steal Overwatch's Loot Box System or Shut Down the Eververse*, POLYGON (Jan. 8, 2018), <https://www.polygon.com/2018/1/8/16855180/overwatch-skins-loot-box-prices-destiny-2-crate-analysis> (exploring the outcry of how *Destiny 2*, a game published by Bungie, Inc. is facing fan outcry for its microtransaction strategy); William Usher, *Destiny 2 Players Are Upset About, Unsurprisingly, Loot Boxes*, CINEMABLEND, <https://www.cinemablend.com/games/1750969/destiny-2-players-are-upset-about-unsurprisingly-loot-boxes>.

76. See Samuel Horti, *How the Loot Box Controversy Shaped Gaming in 2017*, PC GAMER (Dec. 21, 2017), <http://www.pcgamer.com/how-the-loot-box-controversy-shaped-gaming-in-2017/>.

77. See *A Timeline of Video Game Controversies*, NAT'L COALITION AGAINST CENSORSHIP, <http://ncac.org/resource/a-timeline-of-video-game-controversies>.

78. Susan Scutti, *Do Video Games Lead to Violence?* CNN (Feb. 22, 2018), <http://www.cnn.com/2016/07/25/health/video-games-and-violence/index.html>.

79. One example of a typical intellectual property case concerning a video game is *Davis v. Elec. Arts, Inc.*, No. C-10-03328 RS (DMR), 2011 U.S. Dist. LEXIS 71642 (N.D. Cal. July 5, 2011). In that case, retired NFL players Michael E. Davis, Vince Ferragamo, and Billy Joe Dupree filed a complaint alleging that EA violated their statutory and common law rights of publicity through unauthorized use of their likeness in EA's *Madden NFL* video game series.

80. T.J. Hafer, *The Legal Status of Loot Boxes Around the World*, PC GAMER (Oct. 26, 2018), <https://www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next/>.

81. Taylor Stanton Hardenstein, “Skins” in the Game: *Counter-Strike*, *Esports*, and the *Shady World of Online Gambling*, 7 UNLV GAMING L.J. 117 (2017).

Following the release of *SWBFII*, the comparisons of loot boxes to gambling skyrocketed on popular websites such as YouTube and Reddit.⁸² But the debate surrounding loot boxes is hardly one-sided. From the industry side, the Entertainment Software Association, which founded the Entertainment Software Ratings Board, issued a statement to Rolling Stone claiming that, “[l]oot boxes are a voluntary feature in certain video games that provide players with another way to obtain virtual items that can be used to enhance their in-game experiences. They are not gambling.”⁸³ In October, the Electronic Software Rating Board officially declined to classify loot boxes as gambling.⁸⁴ It noted that “[w]hile there’s an element of chance in these mechanics, the player is *always* guaranteed to receive in-game content . . . a similar principal to collectible card games.”⁸⁵

On the legislative side, countries differ on their interpretations of loot boxes. In the United States, a few congressmen have commented on the issue. Rep. Chris Lee from the Hawaiian House of Representatives made an announcement to YouTube denouncing what he called the “predatory behavior” of video game publishers.⁸⁶ Lee particularly condemned EA’s inclusion of loot boxes in *SWBFII*, referring to the game as a “Star Wars-themed online casino, designed to lure kids into spending money.”⁸⁷ Lee stated in the video, and later on Reddit, that a number of statesmen would begin to discuss and consider

82. AngryJoeShow, *Angry Rant – WTF?! At the Loot Crates in Battlefront 2!*, YOUTUBE (Oct. 8, 2017), <https://www.youtube.com/watch?v=ne4CnyNW9O4> (with over 1.6 million views as of Nov. 18, 2018); Jim Sterling, *The Year of the Loot Box (The Jimquisition)*, YOUTUBE (Nov. 13, 2017), <https://www.youtube.com/watch?v=NLDId1UNyg8> (with over 550,000 views as of Nov. 18, 2018); Totalbiscuit, the Cynical Brit, *I Will Now Talk About Lootboxes and Gambling for Just Over 40 Minutes*, YOUTUBE (Oct. 8, 2017), <https://www.youtube.com/watch?v=YMDGPSWWA18> (with 842,136 views as of Nov. 18, 2018); videogamedunkey, *Star Wars Battlefront II (dunkview)*, YOUTUBE (Nov. 28, 2017), <https://www.youtube.com/watch?v=DTBu4tigSDo>; MBMMaverick, *Seriously? I Paid 80\$ to Have Vader Locked?*, REDDIT, https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/dppum98/?context=5 (detailing a common complaint that popular *Star Wars* characters, such as Darth Vader, were not immediately available, but had to be gained through loot boxes or after large amounts of gameplay).

83. Tae Kim, *State Legislators Call EA's Game a 'Star Wars-Themed Online Casino' Preying on Kids, Vow Action*, CNBC (Nov. 22, 2017), <https://www.cnbc.com/2017/11/22/state-legislators-call-eas-game-a-star-wars-themed-online-casino-preying-on-kids-vow-action.html>.

84. Jason Schreier, *ESRB Says It Doesn't See 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>.

85. *Id.*

86. Chris Lee, *Highlights of the Predatory Gaming Announcement*, YOUTUBE (Nov. 21, 2017), https://www.youtube.com/watch?v=_akwRuL4os (with 348,315 views as of Jan. 4, 2019).

87. *Id.*

ways to tackle the loot box issue.⁸⁸ In the state of Washington, State Senator Kevin Ranker drafted a bill that aims to investigate whether loot boxes are a form of gambling, one that specifically targets children.⁸⁹ The bill (SB 6102) has many stated goals, including determining “whether games and apps containing these mechanisms are considered gambling under Washington Law.”⁹⁰

Internationally, there currently exist multiple interpretations of whether loot boxes are a form of gambling. The UK’s gambling commission declined to classify loot boxes as gambling.⁹¹ It wrote in a statement:

A key factor in deciding if that line has been crossed is whether in-game items acquired ‘via a game of chance’ can be considered money or money’s worth. In practical terms this means that where in-game items obtained via loot boxes are confined for use within the game and cannot be cashed out it is unlikely to be caught as a licensable gambling activity.⁹²

The commission explained that it still held concerns regarding loot boxes, and their access to minors warranted a responsibility to keep the practice safe.⁹³ The Gambling Compliance office of New Zealand’s Department of Internal Affairs made a statement to the website Gamasutra explaining that its department does not consider loot boxes to fit within its legal definition of gambling.⁹⁴ On the other end of the argument, a strategic analyst for the Compliance Division of the Victorian Commission for Gambling and Liquor in Australia stated that “what occurs with ‘loot boxes’ does constitute gambling by the definition of the Victorian Legislation.”⁹⁵ The same analyst did note that

88. *Id.*; ChrisLee808, REDDIT (Nov. 22, 2017), https://www.reddit.com/r/gaming/comments/7elin7/the_state_of_hawaii_announces_action_to_address/dq62w5m/ (“While we are stepping up to act in Hawaii, we have also been in discussions with our counterparts in a number of other states who are also considering how to address this issue. Change is difficult at the federal level, but states can and are taking action.”).

89. S.B. 6266, 65th Leg., Reg. Sess. (Wash. 2018), <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/6266.pdf>.

90. *Id.*

91. *Loot Boxes Within Video Games*, GAMBLING COMMISSION, <http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx> (last visited Jan. 29, 2018).

92. *Id.*

93. *Id.*

94. Katherine Cross, *New Zealand Says Lootboxes ‘Do Not Meet the Legal Definition of Gambling’*, GAMASUTRA (Dec. 11, 2017), https://www.gamasutra.com/view/news/311463/New_Zealand_says_lootboxes_do_not_meet_the_legal_definition_for_gambling.php.

95. Andy Chalk, *Australian Gambling Analyst Says Loot Boxes ‘Constitute Gambling’ by Legal Definition (Updated)*, PC GAMER (Nov. 22, 2017),

no formal ruling declared loot boxes to be unauthorized gambling, and enforcement was not likely to be effective.⁹⁶

Certain European countries appear to be taking a more critical look at the loot box system. In April of 2018, The Netherlands Gaming Authority conducted a study of loot boxes in ten videogames and concluded that four of them were in violation of the country's gambling laws.⁹⁷ The Gaming Authority focused on the transferability of loot boxes as the threshold to whether or not they constituted gambling, stating, "Loot boxes contravene the law if the in-game goods from the loot boxes are transferable. Loot boxes do not contravene the law if the in-game goods from the loot boxes are not transferable."⁹⁸ The Gaming Authority considered such games to be "games of chance," and refused to grant them licenses because they violated the country's Betting and Gaming Act.⁹⁹ The Gaming Authority cited concerns for "vulnerable groups such as minors" and called on loot box providers to "remove the addiction-sensitive elements . . . and to implement measures to exclude vulnerable groups or to demonstrate that the loot boxes on offer are harmless."¹⁰⁰

Two weeks after the Netherlands Gaming Authority's announcement, Belgium's Gaming Commission announced an investigation into the loot box system in order to determine if it qualifies as gambling, as well as an intention to ban them throughout Europe.¹⁰¹ On April 25, 2018, the Commission released a report stating that three popular videogames—*Overwatch*, *FIFA 18*, and *Counter-Strike: Global Offensive*, contained loot box systems in violation of Belgium's gambling laws.¹⁰² The Commission, similar to the Netherlands Gaming Authority, stressed the effects such system could have on unprotected minors, and worried that "games of chance in video games will cause

<http://www.pcgamer.com/australian-gambling-analyst-says-loot-boxes-constitute-gambling-by-legal-definition/>.

96. *Id.*

97. NETHERLANDS GAMING AUTHORITY, STUDY INTO LOOT BOXES: A TREASURE OR A BURDEN? 2 (Apr. 10, 2018), <https://kansspelautoriteit.nl/english/loot-boxes/>.

98. *Id.* at 14.

99. *Id.* at 15.

100. NETHERLANDS GAMING AUTHORITY, A STUDY BY THE NETHERLANDS GAMING AUTHORITY HAS SHOWN: CERTAIN LOOT BOXES CONTRAVENE GAMING LAWS, 2 (Apr. 19, 2018), <https://kansspelautoriteit.nl/english/loot-boxes/>.

101. Dustin Bailey, *Sadly, the Belgium Government has Not Yet Declared Loot Boxes Gambling*, PCGAMESN (Nov. 22, 2017), <https://www.pcgamesn.com/star-wars-battlefront-2/battlefront-2-loot-box-gambling-belgium-gaming-commission>.

102. Press Release, Koen Geens, *Loot boxen in drie videogames in strijd met kansspelwetgeving* [Loot Boxes in Three Video Games in Violation of Gambling Legislation], (Apr. 25, 2018), <https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving>.

great damage to people, family and society.”¹⁰³ The Commission declared such systems illegal, and threatened the operators with a prison sentence of up to five years and a fine of up to 800,000 euros.¹⁰⁴ In cases involving minors, punishment could be doubled.¹⁰⁵ As of late April, no comments have been made regarding regulation, nor is there a hard deadline on when the game companies must comply with the law.¹⁰⁶

B. Internet Gambling Laws

Gambling has existed in the United States since before the country’s inception.¹⁰⁷ According to the American Gaming Association, the gambling industry is worth \$240 billion and employs 1.7 million people in forty states.¹⁰⁸ In 2015, gaming taxes contributed an average of \$8.85 billion in state and local tax revenues.¹⁰⁹ Gambling is legal in some form in forty-eight states; only Utah and Hawaii ban it in its entirety.¹¹⁰ As of 2018, “three states—Delaware, Nevada, and New Jersey—have authorized online gambling within their borders.”¹¹¹

Federal law does not provide a set definition for gambling. However, an approximation may be gleamed from legal resources and state court cases. Black’s Law Dictionary does not define the term “gambling,” but it does define “gambling device” as: “any thing such as cards, dice or an electronic or mechanical contrivance, that allows a person to play a game of chance in which money may be won or lost.”¹¹² A “game of chance” is “a game whose outcome is determined by luck rather than skill.”¹¹³

103. *Id.*

104. *Id.*

105. Haydn Taylor, *EA, Activision Blizzard, and Valve Found in Breach of Belgian Gambling Laws*, GAMESINDUSTRY.BIZ (Apr. 25, 2018), <https://www.gamesindustry.biz/articles/2018-04-25-three-industry-leading-publishers-found-in-breach-of-belgian-gambling-laws>

106. *Id.*

107. Roger Dunstan, *Gambling in California*, CALIFORNIA STATE LIBRARY (1997), <https://www.standupca.org/reports/Gambling%20in%20California-1997.pdf>

108. *State of the States; The AGA Survey of the Casino Industry*, AMERICAN GAMING ASS’N (2016), https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States_FINAL.pdf.

109. *Id.*

110. Laura H. Bak-Boyчук, *Internet Gambling: Is Avoiding Prosecution in the United States as Easy as Moving The Business Operations Offshore?*, 6 SW. J.L. & TRADE AM. 363, 381 (1999).

111. Hardenstein, *supra* note 81 (citing Benjamin Miller, *The Regulation of Internet Gambling in the United States: It’s Time for the Federal Government to Deal the Cards*, 34 J. NAT’L. ASS’N ADMIN. L. JUDICIARY 527, 546 (2014)).

112. *Gambling Device*, Black’s Law Dictionary (5th ed. 2016).

113. *Game of Chance*, Black’s Law Dictionary (5th ed. 2016).

The criminalization and regulation of gambling activities has traditionally fallen within the police power of the states.¹¹⁴ Despite its unwillingness to overstep the boundaries of the Tenth Amendment, the federal government has set forth statutes pertaining to interstate gambling.

1. Wire Act

The Interstate Wire Act of 1961 was created amidst a federal interest in curbing organized crime, specifically gambling rings.¹¹⁵ The Wire Act enforces a fine upon the use of:

a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers¹¹⁶

The Wire Act, through the Federal Communications Commission's jurisdiction, empowers federal, state, and local law enforcement agents to "discontinue, or refuse, the leasing, furnishing, or maintaining of" facilities used for such purposes.¹¹⁷ It did not, however, provide a definition for "bet or wager."¹¹⁸

Prior to 2002, the Wire Act "was long interpreted as prohibiting online wagering in all forms."¹¹⁹ This paradigm was no longer applicable after the case of *In re Mastercard Int'l Inc.*, in which the District Court found, and the Fifth Circuit Court of Appeals confirmed, that the Wire Act only applied to sports betting, not all internet gambling.¹²⁰ The District Court of Utah disagreed with the Fifth

114. Jonathan Conon, *Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in "Dead Man's" Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization is Preferable to Legalization*, 99 J. CRIM. L. & CRIMINOLOGY 1157, 1163-64 (2009).

115. See generally Jordan Hollander, *The House Always Wins: The World Trade Organization, Online Gambling, and State Sovereignty*, 12 RUTGERS J.L. & PUB. POL'Y 179, 182 (2015); David Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14 GAMING L. REV. & ECON. 533, 533 (2010).

116. Interstate Wire Act, 18 U.S.C. § 1084(a) (West 2018).

117. 18 U.S.C. § 1084(d).

118. See *id.*

119. Hollander, *supra* note 115, at 180.

120. *In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd sub nom. In re MasterCard Int'l*, 313 F.3d 257, 263 (5th Cir. 2002) (ruling that credit card companies authorizing casinos to accept credit cards through the processing of "gambling debts" did not violate the Wire Act).

Circuit's ruling in *United States v. Lombardo*.¹²¹ In that case, the court disagreed with the defendant's argument that the Wire Act did not extend to their business, which provided out-of-state payment processing services to gambling websites.¹²² The court also noted that the statute was limited to actual bets or wages used in sporting events or contests, however it did not feel this limitation extended to interstate transactions that allow the recipient to receive money as a result of bets, or to receive information assisting in placing bets.¹²³

The differing court interpretations of the Wire Act appear to be moot following the release of a memoranda by the Justice Department in 2011 specifying that interstate transmissions unrelated to a "sporting event or contest" fall outside the Wire Act's reach.¹²⁴ The effects of the Wire Act's limitation are seen through the explosion of internet gambling worldwide in the twenty-first century.¹²⁵

2. *Unlawful Internet Gambling Enforcement Act*

Signed in 2006 by President George Bush, the Unlawful Internet Gambling Enforcement Act (UIGEA) prohibited wagering businesses from knowingly accepting payment in connection with unlawful internet gambling.¹²⁶ Congress noted in the findings the inadequacy of traditional gambling enforcement with the growth of the Internet, and the potential effects internet gambling could have on debt collection.¹²⁷ The UIGEA only applies to unlawful internet gambling, or any bets or wagers that are unlawful under Federal or State Law, including Tribal Lands.¹²⁸ The Act itself, however, does not make Internet gambling illegal.¹²⁹ Instead, it made it illegal for banks and other financial institutions to process certain transactions between United States residents and unlawful gambling sites.¹³⁰ The UIGEA goes further than

121. *U.S. v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007).

122. *Id.* at 1279.

123. *Id.* at 1281-82; Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. NAT'L. ASS'N ADMIN. L. JUDICIARY 527, 534-35 (2014).

124. U.S. DEP'T OF JUST., 35 Op. O.L.C., WHETHER PROPOSALS BY ILL. AND N.Y. TO USE THE INTERNET AND OUT-OF-STATE TRANSACTION PROCESSORS TO SELL LOTTERY TICKETS TO IN-STATE ADULTS VIOLATE THE WIRE ACT 1 (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

125. See Marsha Walton, *The Business of Gambling*, CNN (July 6, 2005), <http://www.cnn.com/2005/US/07/06/cnn25.top25.gambling/>.

126. 31 U.S.C. §§ 5301, 5361-66 (West 2018).

127. 31 U.S.C. §§ 5361(a)(3)-(4).

128. 31 U.S.C. § 5362(10)(A).

129. *Id.*

130. *Id.*

the Wire Act towards penalizing all parties in an illegal transaction: it permits the Federal Reserve System to create regulations that prohibit financial transaction providers from accepting illegal payments.¹³¹

The Treasury and the Federal Reserve Board designated five payment systems covered by the UIGEA in a joint ruling: (i) automated clearing house (ACH) systems, (ii) card systems, (iii) check collection systems, (iv) money transmitting business, and (v) wire transfer systems.¹³² Participants in the designated payment systems are required to establish policies and procedures that are “reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions.”¹³³ The UIGEA exempts certain participants from this requirement, but no exempt participants are identified.¹³⁴ Card systems are not exempted from the UIGEA, and participants using these systems are expected to identify and block restricted transactions.¹³⁵ Despite these requirements, participants are granted relatively broad discretion in designing and implementing policies or procedures.¹³⁶

The UIGEA has successfully led to indictments, particularly in the online poker industry.¹³⁷ But due to recent court reversals and the Justice Department’s narrowing of the Wire Act, the UIGEA “has languished as a federal statute.”¹³⁸

3. Proposed Bills

The Wire Act and the UIGEA represent the current paradigm of gambling regulation on the federal level. However, the former is about sixty years old¹³⁹ while the latter is over a decade old as of writing this Note.¹⁴⁰ One proposed piece of legislation would have attempted to address the perceived regulatory issues in the first two bills. The Internet Gambling Regulation, Consumer Protection, and Enforcement Act was introduced in 2009 by Representative Barney Frank.¹⁴¹ The purpose of

131. See 31 U.S.C. § 5363(4).

132. FDIC, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 OVERVIEW 1 (June 2010), <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>.

133. *Id.*; *Compliance Guide to Small Entities*, FED. RESERVE, <https://www.federalreserve.gov/bankinfo/reggdcg.htm> (last visited Jan. 27, 2018).

134. *Compliance Guide to Small Entities*, *supra* note 133.

135. *Id.*

136. *Id.*

137. James Romoser, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, 536 (2013).

138. Hardenstein, *supra* note 81, at 129; U.S. v. Dicristina, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012), *rev’d*, 726 F.3d 92 (2d Cir. 2013).

139. 18 U.S.C. § 1084 (West 2018).

140. 31 U.S.C. § 5361-66 (West 2018).

141. Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009).

the bill was to “provide for the licensing of Internet gambling activities by the Secretary of the Treasury, to provide for consumer protections on the Internet, to enforce the tax code, and for other purposes.”¹⁴² The bill enjoyed bipartisan support, with forty-seven co-sponsors.¹⁴³ The bill acknowledged the growth of Internet gambling by Americans, as well as the lack of a federal or state statutory framework through which standards could be enforced.¹⁴⁴

III. IDENTIFICATION OF THE LEGAL PROBLEM

Determining if loot boxes constitute gambling creates a two-tiered issue of definition and enforcement. A definition problem exists because without a general definition of gambling, an analysis of the elements cannot be undertaken. Of particular concern is the idea of “value” and whether a loot box, a virtual item, gives players something of value in exchange for a tangible cost. The second issue concerns the lack of any sort of framework through which the United States could enforce standards upon loot boxes should they constitute gambling, as well as an unwillingness to do so in the first place. A third, somewhat related issue is the idea that loot boxes pose a danger at all. Regardless of whether loot boxes are a gambling system, are people’s reactions to the system warranted? Or are there legitimate psychological concerns associated with their encroachment upon AAA gaming?

IV. ANALYSIS

A. Elements

Before examining whether or not video game loot boxes constitute gambling, a working definition and list of elements for “gambling” must exist. Perhaps by design, federal gambling laws do not give a precise definition of gambling. However, by examining various state statutes’ definition of gambling and gambling instruments, a working definition begins to emerge. For example, in California, the state constitution grants the power of gambling authorization and regulation to the Legislature, with the Governor possessing the power to negotiate compacts for gambling on Indian land.¹⁴⁵ The sections pertaining to gambling define its various implementation, typically emphasizing value, consideration, and chance. For instance, a “lottery” in California is:

142. *Id.* at 1.

143. *Id.* at 2.

144. *Id.* at 3.

145. CAL. CONST. art. IV, § 19 (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.).

any scheme for the disposal of or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it . . . upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance.¹⁴⁶

California statutes also include definitions for grab bags¹⁴⁷ and slot machines.¹⁴⁸ The words “chance, consideration,” and “value” or “prize” appear in all of these statutes.¹⁴⁹

In the State of Washington, gambling is defined as:

Staking or risking something of value (2) upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, (3) upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.¹⁵⁰

The concepts of “chance,” “prize,” and “value” are also found in the states with the most liberal gambling laws: Nevada and Louisiana. In the Silver State, “game” or “gambling game” refers to:

Any game played with cards, dice, equipment, or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value¹⁵¹

With all of these state statutes in mind, clearly any form of gambling regulation will have to address value, consideration, and chance. Thus, a working, general definition of gambling could be: “any activity in which consideration is given in a game of chance in return for a prize.”¹⁵² Using this definition, three easily identifiable elements have now come into fruition: consideration, chance, and prize.

146. CAL. PENAL CODE § 319 (West 2018).

147. PENAL § 319.3 (Wherein a grab bag game is defined as a “scheme whereby . . . a person pays valuable consideration to purchase a sports trading card grab bag with the understanding that the purchaser has a chance to win a designated prize...listed by the seller as being contained in one or more, but not all, of the grab bags”).

148. PENAL § 330b(d) (Wherein a slot machine is defined as “a machine...or device that is adapted...for use in any way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operated or may be operated, and by reason of any element of hazard or chance or other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value...”).

149. PENAL § 319, § 319.3.

150. WASH. REV. CODE § 9.46.0237 (West 2018); State ex rel. Evans v. Bhd. of Friends, 41 Wash. 2d 133, 150 (1952) (“[A]ll forms of gambling involve prize, chance, and consideration . . .”).

151. NEV. REV. STAT. § 463.0152 (West 2018).

152. See, e.g., KAN. STAT. ANN. § 21-4302(4) (West 2018); MO. ANN. STAT. § 572.010(3) (West 2018); N.Y. PENAL LAW § 225.00 (McKinney 1934) (originally enacted as N.Y. PENAL LAW 1909 § 982 (1934)); FERNDAL, MICH., ORDINANCE 200, § 2 (1941), quoted in *People of Ferndale v. Palazzolo*, 233 N.W.2d 216, 217-18 (Mich. Ct. App.

1. Consideration

Consideration may exist in the loot box system through the payment of real-world money. An activity cannot be gambling unless the participant is required to risk something of value.¹⁵³ Otherwise, such activity is counted as a “sweepstakes.”¹⁵⁴ A party must have a chance to gain, and stand a risk of loss.¹⁵⁵ The majority of jurisdictions within the United States follow this view, dating back to 1890 in the case of *Yellow-Stone Kit v. State*.¹⁵⁶ In that case, the Alabama Supreme Court held that an illegal lottery did not occur when a promoter did not require participants to pay money in a drawing.¹⁵⁷ No consideration existed because the payment of money was not required for a chance to win.¹⁵⁸ Other court cases have reiterated the idea that payment to participate is required for consideration to exist in a gambling analysis, and such consideration must be more than a minimum effort.¹⁵⁹ Still other courts have ruled that the opportunity for free plays does not negate the element of “consideration” or obviate an inquiry into the purpose and effect of the operation as the final proof of consideration.¹⁶⁰

A minority of jurisdictions assert that gambling consideration is more akin to consideration used in an ordinary contract, such as New York where consideration is any “right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”¹⁶¹ But an argument of whether the loot box system contains consideration heavily depends on the jurisdiction in which it is brought. In Washington, the state Supreme Court found consideration in a free promotion by Safeway

1975); U.S. v. 137 Draw Poker-Type Mach., 606 F. Supp. 747, 749 (N.D. Ohio 1984); Farina v. Kelly, 162 A.2d 517, 520 (Conn. 1960); State v. Durst, 678 P.2d 1126, 1128 (Kan. 1984); Westerhaus Co. v. Cincinnati, 135 N.E.2d 318, 325 (Ohio 1956).

153. See 38 AM. JUR. 2D *Gambling* § 2; see also RICHARD A. LORD, WILLISTON ON CONTRACTS § 17:6 (West 4th ed. 1997) (“The offer of a prize to the winner of an athletic competition does not make a wagering contracts” unless the offeror also competes for the prize.).

154. CAL. BUS. & PROF. CODE §§ 17539.5, 17539.15, 17539.55 (West 2018); TEX. BUS. & COM. CODE §§ 622.001-622.002 (West 2018).

155. See RICHARD A. LORD, Williston on Contracts § 17:6 (West 4th ed. 1997).

156. *Yellow-Stone Kit v. State*, 88 Ala. 196 (1889).

157. *Id.* at 202.

158. *Id.*

159. See *Cal. Gasoline Retailer v. Regal Petroleum Corp. of Fresno*, 50 Cal. 2d 844, 860 (1958) (explaining that a giving away of purchase tickets did not satisfy the consideration requirement).

160. *Barber v. Jefferson Cty. Racing Ass’n*, 960 So. 2d 599, 613 (Ala. 2006), *cert. denied*, 551 U.S. 1131 (2007).

161. Opinion of the Attorney General of New York regarding the “Good as Gold” real estate sales incentive, *Opn. No. 96-F1* (Jan. 29, 1996), <https://ag.ny.gov/sites/default/files/opinion/96-F1%20pw.pdf>.

when the grocery chain required a player to make the effort to fill out forms while benefitting from the increased amount of customers.¹⁶² The United States Supreme Court, on the other hand, did not find consideration in a game-show contest when the money spent went towards stamps, and not towards the operators of the contest.¹⁶³

Under the majority definition, both *Overwatch*'s system and *SWBFII*'s system may not satisfy the element of consideration. It is true that in neither case is a player free to participate in the loot box scheme. Both games require players to pay an initial retail price.¹⁶⁴ The cost of a product itself in no way diminishes its status as consideration.¹⁶⁵ The act of going to a store, either brick-and-mortar or on the Internet, purchasing the games, installing them, and then playing to obtain the loot boxes is certainly more of an effort than simply accepting a ticket stub.¹⁶⁶ By putting forth an effort, and giving a profit to the games' developers and publishers, players of *Overwatch* and *SWBFII* have taken actions that would likely fit within the minority definition of consideration.

However, one must also risk some sort of consideration, for example something of value, for an activity to qualify as gambling in a majority jurisdiction.¹⁶⁷ If a loot box case were to occur in a state requiring consideration, a plaintiff would have a difficult time explaining how players possibly risk the money from their entry fee. The fact is that all of the content from a loot box is available within both games; in other words, players can unlock the content after a certain amount of time playing.¹⁶⁸ The games do not suddenly stop and demand players spend money in order to continue their progression. Nor does either video game require a future payment to play after the initial retail payment.¹⁶⁹ In fact, both games made it a point of pride that future

162. State ex rel. Schillberg v. Safeway Stores, 75 Wash. 2d 339, 351 (1969).

163. F.C.C. v. Am. Broad., Co., 74 S. Ct. 593, 600 (1954).

164. *Overwatch*, BLIZZARD, <https://us.shop.battle.net/en-us/product/overwatch> (last visited Jan. 22, 2018); *Star Wars Battlefront II*, <https://www.origin.com/usa/en-us/store/star-wars/star-wars-battlefront-2/standard-edition> (last visited Jan. 22, 2018).

165. See 1995 FLA. OP. ATT'Y GEN. NO. 95-21 (Mar. 21, 1995) (declaring that consideration may exist when there is a benefit to the promoter).

166. *California Gasoline Retailer*, 50 Cal. 2d at 861-62.

167. See 38 AM. JUR. 2D *Gambling* § 2; see also RICHARD A. LORD, WILLISTON ON CONTRACTS § 17:6 (West 4th ed. 1997).

168. See Allegra Frank, *Unlocking Everything from an Overwatch Event Could Take Hundreds of Hours (Update)*, POLYGON (Apr. 24, 2017), <https://www.polygon.com/2017/4/24/15406162/overwatch-uprising-event-items>; see also Allegra Frank, *Star Wars Battlefront 2 Content Might Take Years to Unlock, but EA Won't Say*, POLYGON (Nov. 15, 2017), <https://www.polygon.com/2017/11/15/16656478/star-wars-battlefront-2-content-unlock-time-cost> (examining players' estimations about the amount of time and money needed to unlock all of the game's content).

169. See Eddie Makuch, *E3 2017: Star Wars Battlefront 2's DLC is Free, But There are Things to Spend Money On*, GAMESPOT (June 10, 2017),

content would be free to all players.¹⁷⁰ Therefore, it is difficult to make the argument that a player of *Overwatch* or *SWBFII* is risking any sort of consideration; their retail payment already gave them access to the entire game.

2. *Chance*

Loot boxes easily satisfy the chance element in a gambling analysis. “Chance” refers to “a lack of control over events or the absence of controllable causation, that is, the opposite of intention.”¹⁷¹ The introduction of computers and the algorithms they produce has no effect on the general definition of chance.¹⁷² In the majority of gambling statutes, an activity is gambling if it is a “game of chance,” rather than a “game of skill.”¹⁷³ To determine if an activity is a game of chance, many states employ a “predominant purpose test.”¹⁷⁴ Other states utilize a “material element test,” which “considers not only skill-to-chance ratios, but also whether the contest is entered into among novices or experts [and] whether the amount of information provided to the contestants negates the skill-based advantages that true experts may have obtained.”¹⁷⁵ Some states, such as Arizona, Arkansas, Iowa, and

<https://www.gamespot.com/articles/e3-2017-star-wars-battlefront-2s-dlc-is-free-but-t/1100-6450730/>; see Cass Marshall, *New player? Here's how to get into Overwatch*, HEROES NEVER DIE (May 23, 2018), <https://www.heroesneverdie.com/2018/5/23/17348648/new-player-guide-overwatch> (“You can purchase cosmetic skins, sprays, and emotes, but all maps, heroes, game modes and arcade events are free”).

170. See Makuch, *E3 2017*, *supra* note 169; see Marshall, *supra* note 169.

171. 38 AM. JUR. 2D *Gambling* § 2.

172. *Barber v. Jefferson County Racing Ass’n*, 960 So. 2d 599, 609 (“a device is no less a slot machine because it operates within a *network*, that is, because it shares computer-processing equipment with a number of similar devices” (alteration in original)).

173. D.A. Norris, Annotation, *What Are Games of Chance, Games of Skill, and Mixes Games of Chance and Skill*, 135 A.L.R. 104 (2010) (citing cases evaluating games of chance and games of skill).

174. See, e.g., *In re Allen*, 377 P.2d 280, 281 (Cal. 1962) (en banc) (“The term ‘game of chance’ has an accepted meaning established by numerous adjudications. . . . The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor”); *Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1223 (Kan. Ct. App. 2011); *Commonwealth v. Lake*, 57 N.E.2d 923, 925 (Mass. 1944) (“Where the game contains elements both of chance and of skill, in order to render the laws against lotteries effectual . . . it has been found necessary to draw a compromise . . . with the result that by the weight of authority a game is now considered a lottery if the element of chance predominates and not a lottery if the element of skill predominates.”); *O’Brien v. Scott*, 20 N.J. Super. 132, 137 (Super. Ct. 1952) (explaining New Jersey’s application of the predominant purpose test).

175. Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 664 (citing Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports*, 2016 U. ILL. L. REV. 117, 134 (2016)).

Tennessee consider the element satisfied when luck enters in at any point as a substantial factor in determining an outcome.¹⁷⁶

Loot box systems would satisfy each of the three tests used by state courts. Both the UK and the ESRB admit that chance is a factor in the gaining of loot boxes.¹⁷⁷ While EA has yet to do so for *SWBFII*, Blizzard has published *Overwatch*'s drop rates to better comply with South Korean and Chinese gambling laws.¹⁷⁸ These rates illustrate that at no point does a player's performance affect what kind of item they will receive from a loot box.¹⁷⁹ Instead, no matter what, an *Overwatch* player is guaranteed at least one Rare item in each box.¹⁸⁰ An Epic item or above will be included, on average, in 18.5 percent of boxes, and a Legendary item will be included, on average, in approximately 7.5 percent of all boxes.¹⁸¹ The items included in a loot box are not in any way indicative of the players' actions. As soon as someone purchases or earns a loot box through gameplay, its contents are predetermined.¹⁸²

SWBFII has not published its drop rates, but from player reactions it appears that the system is comparable.¹⁸³ Items achieved through the loot boxes have no correlation with the player's skill, and depend entirely upon chance.¹⁸⁴ The goal is subtle: incentivize players to purchase loot boxes to better gain a chance of obtaining an item that they want. But while *Overwatch*'s items are purely cosmetic, *SWBFII*'s items

176. TENN. CODE. ANN. § 39-17-501(1) (West 2018) (defining gambling as "risking anything of value for a profit whose return is to any degree contingent on chance"); State v. Torres, 831 S.W.2d 903, 905 (Ark. 1992) (stating that under Arkansas law, gambling means "the risking of money, between two or more persons, on a contest or chance of any kind, where one must be *loser* and the other *gainer*" (alteration in original) (citation omitted)); Parker-Gordon Importing Co. v. Benakis, 238 N.W. 611, 613 (Iowa 1931) (noting that Iowa finds it irrelevant whether a particular game is predominantly based on chance or skill).

177. Schreier, *supra* note 84; see GAMBLING COMMISSION, *supra* note 91.

178. *On the New Overwatch Supply Extraction Probability Notice*, OVERWATCH, <http://ow.blizzard.cn/article/news/486> (last visited Jan. 26, 2018).

179. *Id.*

180. *Id.* Recall that the tiers of rarity in *Overwatch* are "Common" items, "Rare" items, "Epic" items, and "Legendary" items.

181. *Id.*

182. Overwatch (@PlayOverwatch), TWITTER (May 18, 2017), <https://twitter.com/playoverwatch/status/865383227980103680>.

183. See Chaim Gartenberg, *EA's Battlefront II Changes Highlight the Disconnect Between Gameplay and Progress*, THE VERGE (Dec. 8, 2017), <https://www.theverge.com/2017/12/8/16748392/star-wars-battlefront-2-loot-box-changes-progression-problem-credits-microtransactions-grind>; see also Owen S. Good, *I Spent \$90 in Battlefront 2, and I Still Don't Have Any Control Over My Characters*, POLYGON (Nov. 16, 2017), <https://www.polygon.com/2017/11/16/16658476/star-wars-battlefront-2-loot-crate-costs-analysis> ("And a pure grinder is still forced to use the game's loot crate system, which spits out bonuses entirely at random.").

184. See Good, *supra* note 183.

constitute basic gameplay functions, character unlocks, and powerful in-game effects.¹⁸⁵ A player who can earn the items directly through gameplay has no need to purchase these loot boxes, as chance is no longer a factor in his or her obtaining of an item. EA has announced that they wish to revamp their system so that the highest-tiered items can only be found through gameplay milestones rather than loot boxes.¹⁸⁶ This adds a skill element to obtaining a few items, but the loot box system is still in place. Unless the system is completely revamped, players must rely on chance to obtain the vast majority of items in *SWBFII*. An analysis into each of the three tests is unnecessary; because chance is the sole factor that determines what a player obtains in a loot box, the element is satisfied.

3. Prize

Even though they are arguably redeemable for something of value, current case law would not support an assertion that loot boxes provide prizes of value. An activity must give a “prize” in order for it to be considered gambling.¹⁸⁷ It has been held that the prize, reward, or “something of value” element in gambling is not limited to opportunity to win money but includes the opportunity to win free games.¹⁸⁸ Both California and Washington emphasize the word “value” in general terms.¹⁸⁹ The phrasing, often used in conjunction with other terms such as “money” or “coin,” implies an understanding that what is valuable to one person varies greatly. In Nevada, “representative of value” is defined as: “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.”¹⁹⁰ This statute seems

185. *See id.*

186. Richard Walker, *The Way Star Wars Battlefront 2's Crates and Star Cards Work is Being Updated*, XBOX ACHIEVEMENTS (Oct. 31, 2017), <https://www.xboxachievements.com/news/news-28443-The-Way-Star-Wars-Battlefront-2-s-Crates-and-Star-Cards-Work-is-Being-Updated.html>.

187. Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Economic Value, Equal Dignity, and the Future of Sweepstakes*, 1 U. NEV. LAS VEGAS GAMING L.J. 1, 2 (2010) (“If you take away any one of the three elements of gambling . . . prize . . . you have an activity that is legal in most states.”).

188. NELSON ROSE & MARTIN D. OWENS, *Basics: Common Law Definitions and Formats of Gambling and Quasi-Gambling Games*, in INTERNET GAMING LAW 26 (Mary Ann Liebert 2005).

189. CAL. PENAL CODE §§ 319, 330b(d) (West 2018); WASH. REV. CODE § 9.46.0237 (West 2018).

190. NEV. REV. STAT. § 463.01862.

consistent with the current paradigm: something must be redeemable for cash, merchandise, or services in order to be considered a prize.¹⁹¹

The UK Gambling Commission and the ESRB emphasize the fact that items gained in loot boxes cannot be “cashed out.”¹⁹² It is significant that in many games implementing loot box systems a player cannot directly sell their loot boxes to other players.¹⁹³ Attorney Marc Whipple suggests that, once a player obtains a loot box, someone could theoretically sell their account.¹⁹⁴ He notes that this would violate the terms of service, and was certainly not intended by the developer.¹⁹⁵ *Overwatch*’s website stresses that, “[l]oot Boxes are bound by account and platform.”¹⁹⁶ Similarly, EA’s terms of service specify:

When you access or use an EA Service, you agree that you will not:

Sell, buy, trade or otherwise transfer or offer to transfer your EA Account, any personal access to EA Services, or any EA Content associated with your EA Account, including EA Virtual Currency and other Entitlements, either within an EA Service or on a third party website, or in connection with any out-of-game transaction, unless expressly authorized by EA.¹⁹⁷

Clearly, neither company intends for individuals to sell the content they earn from playing their games. Players cannot expect any form of monetary value by playing these videogames. But even taking this into account, courts appear reluctant to tie virtual currency with real world currency. There is not much case law that analyzes “value” in the context of video game items, however, the Western District Court of Washington had the opportunity to address the question on multiple occasions. In the case of *Kater v. Churchill Downs Incorporated*, the court declined to classify a virtual casino game as gambling due to its lack of real-world monetary capability.¹⁹⁸ *Kater* involved a video-game,

191. See, e.g., *U.S. v. Sixteen Elec. Gambling Devices*, 603 F. Supp. 32, 34 (D. Haw. 1984) (ruling that meters to record credits won on game machines plus “knockoff switches” to reset count for next player indicated use in gambling).

192. GAMBLING COMMISSION, *supra* note 91.

193. *Robot Congress—52—Are Loot Boxes Gambling (Ft. Marc Whipple)*, HEADGUM (Oct. 24, 2017), <https://headgum.com/robot-congress/robot-congress-52-are-loot-boxes-gambling-ft-marc-whipple>.

194. *Id.*

195. *Id.*

196. *Shop*, BLIZZARD, <https://us.shop.battle.net/en-us/product/overwatch-loot-box> (last visited Jan. 27, 2018); see also *Blizzard End User License Agreement*, BLIZZARD, <http://us.blizzard.com/en-us/company/legal/eula> (last updated Aug. 17, 2017) (expressly forbidding the selling of an account or content in an account).

197. *Electronic Arts User Agreement*, EA, <https://www.ea.com/terms-of-service> (last updated Aug. 18, 2017).

198. *Kater v. Churchill Downs Inc.*, No. C15-612MJP, 2015 WL 9839755, at *4 (W.D. Wash. Nov. 19, 2015).

Big Fish Casino, in which players could “play the games for free by using only the virtual casino chips awarded to them without charge” while retaining the option to purchase the chips with real-world money.¹⁹⁹ Players also received additional chips as a reward when they won one of the games.²⁰⁰ The plaintiffs alleged that by allowing users to extend gameplay using chips or selling the chips on a secondary market for real-world cash, the developers of *Big Fish Casino* violated state gambling laws.²⁰¹ The court was not convinced. The chips to be gained in *Big Fish Casino* could only be used to extend gameplay, and the continued amusement of a player did not fit within the category of “value” the court used.²⁰² Furthermore, while third party sites were selling the chips, *Big Fish Casino*’s terms of use prohibited doing so, and they could not be held liable for the actions of individuals violating those terms.²⁰³

The same principals applied in the case of *Chaset v. Fleer/Skybox Intern*, in which the Ninth Circuit examined gambling in the context of trading card games.²⁰⁴ In *Chaset*, the plaintiffs were a group of trading card purchasers alleging that the random inclusion of limited edition trading cards in packages of randomly assorted cards constituted unlawful gambling in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).²⁰⁵ The court dismissed the actions, ruling that the “disappointment upon not finding an insert card in the package is not an injury to property.”²⁰⁶

Neither *Overwatch* nor *SWBFII* allow players to sell their accounts, or the content in their accounts.²⁰⁷ Both have end user license agreements expressly forbidding these acts. Therefore, it can be argued that neither game contemplates the introduction of real-world money into their ecosystem, except for the sole purpose of purchasing loot boxes. The only possible value to be gained from the games are the items contained in the loot boxes, however, courts have yet to classify such items as having value.²⁰⁸ The disappointment that comes from not

199. *Id.* at *1.

200. *Id.*

201. *Id.* at *2.

202. *Id.* at *3.

203. *Id.* at *4.

204. *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1084 (9th Cir. 2002).

205. *Id.* at 1085.

206. *Id.* at 1087.

207. *Blizzard End User License Agreement*, BLIZZARD (Aug. 17, 2017), <http://us.blizzard.com/en-us/company/legal/eula> (expressly forbidding the selling of an account or content in an account); *Electronic Arts User Agreement*, EA (Aug. 18, 2017), <https://www.ea.com/terms-of-service>.

208. *See Kater*, 2015 WL 9839755 at *3.

gaining a particular item has yet to be ruled as an injury. Loot boxes cannot satisfy the prize element before such a determination is made. It should be noted that this analysis is solely based off of a scant amount of preexisting legal precedent. It is entirely possible that more technically-literate court judges will judge “value” in more than just monetary terms.²⁰⁹ Until such a shift in perception occurs the in-game items received from loot boxes cannot be considered value.

B. The Difficulty of Regulating Loot Boxes on the Federal Level

Even if loot boxes are gambling, the lack of applicable federal law proves a difficult barrier for the government to overcome. After *In re Mastercard Int’l Inc.* and the Justice Department’s memoranda, the Wire Act is only deemed to apply to sports betting.²¹⁰

The UIGEA, while containing more teeth than the Wire Act, proves just as ineffective towards regulating loot boxes. Both games utilize a credit card system, thus their payment systems would be non-exempt from the statute.²¹¹ The UIGEA covers all card systems, including: “credit, debit, and stored value.”²¹² However, the UIGEA has not been substantially utilized since 2004, when the government indicted three of the largest United States online poker sites at the time.²¹³ But even disregarding its infrequent use, the UIGEA only precludes “Internet gambling operators from accepting money related to any online gambling that violates state or federal law.”²¹⁴ The UIGEA in it of itself does not make a gambling activity illegal.²¹⁵ Loot boxes have not been ruled as gambling in any jurisdiction of the United States. Nor have any states criminalized them. If they were deemed gambling, their legality would entirely depend on state law. Every state except for Utah and Hawaii has a gambling commission, and these commissions vary widely

209. Katherine Cross, *How the Legal Battle Around Loot Boxes Will Change Video Games Forever*, THE VERGE (Dec. 19, 2017), <https://www.theverge.com/2017/12/19/16783136/loot-boxes-video-games-gambling-legal>.

210. *In re MasterCard Int’l*, 313 F.3d 257, 263 (5th Cir. 2002); U.S. DEP’T OF JUST., *supra* note 124.

211. *Terms of Sale*, Blizzard, <http://us.blizzard.com/en-us/company/about/termsofsale.html>; *Buy Star Wars: Battlefront II*, EA, <https://www.ea.com/games/starwars/battlefront/battlefront-2/buy>.

212. *Compliance Guide to Small Entities*, *supra* note 133. FDIC, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 OVERVIEW 2 (June 2010), <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>.

213. See Hardenstein, *supra* note 81, at 129.

214. Hollander, *supra* note 115, at 194.

215. Benjamin Miller, *The Regulation of Internet Gambling in the United States: It’s Time for the Federal Government to Deal the Cards*, 34 J. NAT’L. ASS’N ADMIN. L. JUDICIARY 527, 538 (2014).

on their authority.²¹⁶ Because Utah and Hawaii are the only states to ban gambling entirely, under the current legal framework those two states would be the only places where people could not make credit card payments to purchase loot boxes.²¹⁷

C. Does an Issue Even Exist?

On account of its slow-moving, technologically-inadequate nature, the common law is not likely to see loot boxes as gambling. Despite the inadequacies of the legal system, this analysis is not implying that the concerns over loot boxes are not legitimate, or that publishers may continue to use the loot box system with impunity. Loot boxes still overlap with many traditional forms of gambling, and this overlap, mixed with the addictive nature of video games, showcases a need for some sort of intervention, hopefully in the form of self-regulation.

While speaking to PC Gamer, Dr. Luke Clark, director at the Center for Gambling Research at the University of British Columbia, explained the role that “variable rate reinforcement” and dopamine production plays in loot boxes.²¹⁸ Dr. Clark explained that, “[t]he player is basically working for reward by making a series of responses, but the rewards are delivered unpredictably.”²¹⁹ The unpredictable rewards, he explained, trigger dopamine cells within the brain, because “dopamine cells are most active when there is maximum uncertainty, and the dopamine system responds more to an uncertain reward than the same reward delivered on a predictable basis.”²²⁰ Gambling systems exploit these reactions to encourage continued play, and, at least in Dr. Clark’s opinion, parallels could be drawn with loot box systems.²²¹

Psychology Professor Ronald Riggio also saw gambling as variable rate enforcement at work, or the idea that you have to keep playing to win.²²² He specified that the surprise of never knowing when a bet will

216. See Chuck Humphrey, *State Gambling Agency Sites*, GAMBLING-LAW-US, <http://www.gambling-law-us.com/Useful-Sites/State-Gambling-Agencies.htm> (last visited Jan. 29, 2018).

217. See Bak-Boychuk, *supra* note 110.

218. Alex Wiltshire, *Behind the Addictive Psychology and Seductive Art of Loot Boxes*, PC GAMER (Sept. 28, 2017), <http://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/>.

219. *Id.*

220. *Id.*

221. *Id.*

222. Mat Paget, *Battlefront 2’s Loot Boxes and Gambling: Exploring the Secret Psychology Behind it all*, GAMESPOT (Nov. 30, 2017), <https://www.gamespot.com/articles/battlefront-2s-loot-boxes-and-gambling-exploring-t/1100-6455184/>.

take off provides the thrill that motivates gamblers.²²³ Professor Riggio and the host also discussed the concept of “social proofing.”²²⁴ Under this psychological phenomenon, individuals form a tendency to “use the actions of others to decide on proper behavior for ourselves, especially when we view those others to be similar to ourselves.”²²⁵ Professor Riggio used a shopping channel as an example: some shopping channels display numbers showing how many people have called in to purchase an item in order to make it seem more desirable.²²⁶ The social proofing principal can be applied to both *Overwatch* and *SWBFII*. In *Overwatch*, everyone has access to the same heroes (the video game avatars people play as). Because all of the characters are available, items gained from loot boxes are the only substantial way for players to distinguish themselves.²²⁷ By seeing a particularly interesting costume, or by possessing a desire to individualize their character, the social proofing phenomenon suggests that a player will be more likely to purchase a loot box to fulfill this desire. Meanwhile, in *SWBFII*, if you are killed by a player, you are presented with the opponent’s Star Cards. The frustration factor of being beaten by someone with better equipment can operate on the same principle as *Overwatch*, and fuel a desire to gain loot boxes to catch up to that player.²²⁸

Professor Riggio suggested that a third psychological principle, the “scarcity principal,” was also present in certain loot box systems.²²⁹ He noted that in *Overwatch*, certain “seasonal skins” were only available for a short period of time.²³⁰ By having a limited time to act, individuals place a higher value on the loot boxes. Just as with gambling, the “jackpot” is rarely attainable, but everyone wants to score. The health implications derived from these sorts of online Skinner-Boxes should not be ignored. For the first time in history, gaming addiction will be included in the World Health Organization’s Eleventh International Classification of Diseases.²³¹ Loot boxes may not legally constitute gambling, but they share more than a few parallels with traditional

223. *Id.*

224. *Id.*

225. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* IX, 120 (4th ed. 2001).

226. Paget, *supra* note 222.

227. See BLIZZARD, *supra* note 33.

228. Paget, *supra* note 223.

229. *Id.*

230. *Id.* For an example of a seasonal event, see Michael McWhertor, *Here are Overwatch’s Winter Wonderland 2017 Skins*, POLYGON (Dec. 12, 2017), <https://www.polygon.com/2017/12/12/16768180/overwatch-skins-winter-wonderland-2017-gallery-blizzard-mei>.

231. Jake Wakefield, *Gaming Addiction Classified as Disorder by WHO*, BBC (Jan. 2, 2018), <http://www.bbc.com/news/technology-42541404>.

gambling, especially in the realm of psychological effects on their participants.

V. PROPOSAL

A. Legislation

More than one state has already called for legislation regarding loot boxes.²³² In both Hawaii and Washington's case, the politicians emphasize disclosure and regulation, rather than outright ban.²³³ Because loot boxes are not gambling, a statute such as the unenacted Internet Gambling Regulation, Consumer Protection, and Enforcement Act would be ineffective.

1. Foreign Laws

While the West does not have a law meant to specifically address video-game monetization, laws from Asian countries, where the practice originated, may provide guidance. In 2012, Japan's Consumer Affairs Agency passed a law banning a model known as *kompū gacha*, or "Complete Gacha."²³⁴ The complete *gacha* system allowed players to collect items in a virtual loot pool, and then combine sets of the items to obtain rarer versions.²³⁵ The legislation, titled the Law for Preventing Unjustifiable Extras or Unexpected Benefit and Misleading Representation, regulated the practice of complete *gacha*.²³⁶ Despite the fact that developers removed the complete *gacha* system from their games, other types of loot boxes and *gacha* systems were legal, and the legislation seems to have had little effect.²³⁷

232. Lee, *supra* note 86; S.B. 6266, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

233. *See id.*

234. *See* Akky Akimoto, *Japan's Social-Gaming Industry Hindered by Government's Anti-Gambling Move*, JAPAN TIMES (May 16, 2012), <https://www.japantimes.co.jp/life/2012/05/16/digital/japans-social-gaming-industry-hindered-by-governments-anti-gambling-move>.

235. *Id.*

236. *Id.*

237. *Id.*; Vic Hood, *What the UK Can Learn from the Far East's Battle with Loot Boxes*, EUROGAMER (Oct. 20, 2017), <http://www.eurogamer.net/articles/2017-10-19-what-the-uk-can-learn-from-the-far-east-battle-with-loot-boxes>.

In China, the Ministry of Culture passed a law requiring publishers to disclose item drop rates for loot boxes.²³⁸ The full law (translated) reads:

Online game publishers shall promptly publicly announce information about the name, property, content, quantity, and draw/forged probability of all virtual items and services that can be drawn/forged on the official website or a dedicated draw probability webpage of the game. The information on draw probability shall be true and effective.

Online game publishers shall publicly announce the random draw results by customers on notable places of official website or in game, and keep record for government inquiry. The record must be kept for more than 90 days. When publishing the random draw results, some measures should be taken place to protect user privacy.²³⁹

In response to the new law, Blizzard released the odds of winning items contained in loot boxes in March of 2017.²⁴⁰

Using guidance from both United States law and international law, a potential statute simply banning loot boxes would likely lead to a work-around system. But a workable statute could exist. Such a statute should incorporate three elements: investigation, disclosure, and regulation.

For investigation, the Washington Bill provides a clear guideline. It tasks the state gambling commission with investigation of the use and effects of loot boxes.²⁴¹ On a federal level, a statute that allows the individual state gambling commission to conduct their own investigations could prove effective. This hands-off approach has been contemplated in previous gambling statutes, such as the UIGEA, which defines “unlawful internet gambling” as those bets and wagers unlawful under both Federal and State law.²⁴²

As to disclosure, the international laws show the best approach. Companies have already shown a willingness to comply with publishing drop rates.²⁴³ Such a practice would not hamper the development of the game. A statute requiring disclosure would allow consumers to see the odds of obtaining rare items in a game, and decide for themselves

238. Allison McAloon, *Online Games Will be Required to Disclose Random Loot Box Odds in China*, GAMASUTRA (Dec. 8, 2016), https://www.gamasutra.com/view/news/287258/Online_games_will_be_required_to_disclose_random_loot_box_odds_in_China.php.

239. *Id.*

240. *On the New Overwatch Supply Extraction Probability Notice*, OVERWATCH, <http://ow.blizzard.cn/article/news/486> (last visited Jan. 26, 2018).

241. S.B. 6266, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

242. 31 U.S.C. § 5362(10)(A) (West 2018).

243. *New Overwatch Supply Extraction Probability Notice*, *supra* note 240.

whether they wish to invest the time into obtaining said items. Seeing as the loot box model is already so successful without such rates being published, it is unlikely that publishing them would deter a significant amount of players from purchasing a game.

Finally, a potential statute would need regulation, or some sort of enforcement aspect. An age minimum would be the most visible implementation of regulation. In the United States, the majority of states require an individual to be twenty-one in order to engage in gambling.²⁴⁴ By setting an age minimum to engage in the loot box practice, a game company would be less likely to include microtransactions out of fear of losing sales. Representative Chris Lee also contemplated an age minimum, explaining to the website Kotaku that, “[g]ambling has been illegal especially for minors and young adults because they are psychologically vulnerable . . . [kids] often don’t have the cognitive maturity to make appropriate decisions when exposed to these kinds of exploitative mechanisms.”²⁴⁵ An age minimum accomplishes the goal of protecting minors, and creates disincentives for game companies to not engage in the practice of including loot boxes in their products.

B. Self-Regulation

Due to the perceived lack of interest by the federal government, a legislative route may prove impractical. While equally impractical in some ways, a self-regulating route overseen by publishers and the larger gaming community may yield more effective results.

1. The Entertainment Software Rating Board

The closest to a regulatory body in the gaming industry is the Electronic Software Rating Board, or ESRB. It was formed in 1994 after federal lawmakers threatened to establish commissions to regulate violent content in video games.²⁴⁶ The ESRB is tasked with “[assigning] ratings for video games and apps so parents can make informed choices.”²⁴⁷ Its rating system includes rating categories, content

244. *Complete Guide to USA Casino Gambling*, CASINO.ORG, <https://www.casino.org/local/guide/> (last visited Jan. 30, 2018).

245. Cecilia D’Anastasio, *Hawaii State Rep is Drafting Bill Barring Minors from Buying Games with Loot Boxes*, KOTAKU (Dec. 8, 2017), <https://kotaku.com/hawaii-state-rep-is-drafting-bill-barring-minors-from-b-1821136540>.

246. See Andy Chalk, *Inappropriate Content: A Brief History of Videogame Ratings and the ESRB*, THE ESCAPIST (July 20, 2007), <http://www.escapistmagazine.com/articles/view/video-games/columns/the-needles/1300-Inappropriate-Content-A-Brief-History-of-Videogame-Ratings-and-t>.

247. *About ESRB*, ESRB, <http://www.esrb.org/about/> (last visited Jan 21, 2018).

descriptors, and interactive elements.²⁴⁸ In addition to establishing ratings, the ESRB “enforces industry-adopted advertising guidelines and helps ensure responsible web and mobile privacy practices.”²⁴⁹

The ESRB’s rating system contemplates in-app purchases, online gambling, and potentially loot boxes.²⁵⁰ The ESRB’s own interactive elements disclaimers inform purchasers of in-app purchases.²⁵¹ When a game contains “simulated gambling,” it is designated with a “Teen” rating for players ages thirteen and up.²⁵² The most stringent rating is the “AO” or “Adults Only” rating.²⁵³ It is classified as games containing “Content suitable only for adults ages 18 and up. May include prolonged scenes of intense violence, graphic sexual content and/or gambling with real currency.”²⁵⁴ As of writing this Note, the ESRB lists only twenty-seven games with an AO rating; only one of these games, *Peak Entertainment Casinos*, carries the rating for gambling, the rest obtained it through extreme violence or sexual content.²⁵⁵

Historically, game developers and publishers have taken every step to avoid an AO rating.²⁵⁶ The majority of large retailers refuse to sell AO games in their stores.²⁵⁷ Thus, a self-regulating solution exists in the ESRB’s policies. If loot boxes are found to be gambling, the Board would be forced to classify the games as AO. Large retailers would refuse to stock the games, causing deep profit losses for the developers and publishers. No company would want to face such a loss when considering the current price of AAA game development, so it stands to reason that they would remove the gambling aspects of their game to bring the rating down.

2. Public Pressure

Potential legal solutions exist that could affect the proliferation of loot boxes. But to borrow Occam’s Razor, perhaps the best answer is the simplest one: public pressure. The majority of large gaming news in late 2017 concerned loot boxes. Already, companies have shown a hesitation regarding their implementation, or removed them outright

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *ESRB Ratings Guide*, ESRB, http://www.esrb.org/ratings/ratings_guide.aspx (last visited Jan. 21, 2018).

253. *Id.*

254. *Id.*

255. *List of AO-Rated Games*, ESRB, <http://www.esrb.org/ratings/search.aspx> (select “AO (Adults Only) from Rating drop-down).

256. Schreier, *supra* note 84.

257. *Id.*

following public outcry.²⁵⁸ Others have backtracked in an attempt to avoid a rapidly developing stigma.

Shortly before releasing the game, EA temporarily removed loot boxes from *SWBFII* entirely, acknowledging the concerns that Star Cards gave paying players unfair advantages.²⁵⁹ EA also promised a major overhaul of the in-game economy, as well as drop-rate adjustments for items.²⁶⁰ While EA still insists on implementing microtransactions in their future games, representatives grudgingly admit that *SWBFII* underperformed and that the controversy was “a learning experience.”²⁶¹ Patrick Söderland, EA’s newest chief design officer, explained that the company “had the intent . . . to have more people play [*SWBFII*] over a longer period of time.”²⁶² Despite his regret over the controversy, Söderland expressed positivity, stating that “[p]eople seem to appreciate what we’ve done, players are coming back, and we’re seeing stronger engagement numbers” after the removal of the loot box mechanism.²⁶³

Other companies appear to have gotten the message. The title, *Metal Gear Survive* from Konami received negative press coverage after it was revealed that the game would require players to maintain a constant internet connection, and would contain microtransactions.²⁶⁴ Yuji Korekado, the game’s producer, clarified that the game would not have loot boxes, and that “there will not be pay-to-win types of

258. See Michael McWhertor, *Middle-Earth: Shadow of War’s Microtransactions are being Removed from the Game*, POLYGON (Apr. 3, 2018), <https://www.polygon.com/2018/4/3/17192132/middle-earth-shadow-of-war-microtransactions-removed-war-chests-gold-marketplace> (Wherein one company, Monolith, removed microtransactions from their game, including loot boxes).

259. Eddie Makuch, *Shortly Before Star Wars: Battlefront 2’s Release, EA Removes Microtransactions For Now*, GAMESPOT (Nov. 20, 2017), <https://www.gamespot.com/articles/shortly-before-star-wars-battlefront-2s-release-ea/1100-6455042/>.

260. Allegra Frank, *Star Wars Battlefront 2 Update Increases Credit Drops, With More Changes to Come*, POLYGON (Dec. 4, 2017), <https://www.polygon.com/2017/12/4/16733416/star-wars-battlefront-2-loot-boxes-credit-rewards-increased>.

261. Eddie Makuch, *Star Wars Battlefront 2 Underperforms, Microtransactions Coming Back*, GAMESPOT (Jan. 30, 2018), <https://www.gamespot.com/articles/star-wars-battlefront-2-underperforms-microtransac/1100-6456447/>.

262. Andrew Webster, *EA Says It’s Learned from Star Wars Battlefront Controversy, Vows to ‘Be Better’*, THE VERGE (Apr. 13, 2018), <https://www.theverge.com/2018/4/13/17230874/ea-star-wars-battlefront-2-loot-box-patrick-soderlund-interview>.

263. See *id.*

264. Ali Jones, *Metal Gear Survive’s Microtransactions Will Not be Pay-to-Win*, PCGAMESN (Jan. 22, 2018), <https://www.pcgamesn.com/metal-gear-survive/metal-gear-survive-microtransactions-always-online>.

microtransactions.”²⁶⁵ Or take *Destiny 2*, developed by Bungie, Inc. Despite receiving generally favorable reviews (its PC version, XBOX One version, and PlayStation 4 version is currently sitting at 83/100, 87/100, and 85/100 on Metacritic respectively)²⁶⁶ the game received a multitude of criticisms the past few months, in particular with its use of loot boxes.²⁶⁷ Once criticisms seeped out of the game’s dedicated forums and onto websites, Bungie began announcing large-scale changes in response to player feedback in what some people have dubbed an “apology tour.”²⁶⁸ Finally, Apple, without facing any sort of criticism for use of loot boxes, took a preemptive protective measure by requiring apps on its App Store to disclose the odds of the likelihood of players obtaining certain items.²⁶⁹

Clearly, where before game companies could leave their systems intact without any further communication with the players, the nature of the Internet has allowed criticisms to be amplified and with a greater range than regular protest. The use of websites such as Reddit and Twitter could allow company representatives to better directly engage with their customers, and vice versa. The fact that these companies are now on the defensive when it comes to explaining their microtransaction systems shows that, at least for now, the criticism is reaching their attention. They cannot simply “turn off” the Internet. Seeing as none of the federal bills have made it past the discussion stage, and a potential statute would require investigations into whether loot boxes constituted gambling, the action of online or real-world protest may present the best solution. Campaigns dedicated to informing video game company representatives of criticisms, not participating in loot box systems, or just

265. *Id.*

266. *Destiny 2*, METACRITIC, <http://www.metacritic.com/game/pc/destiny-2> (for other versions, follow “Also On” link).

267. Friedman, *supra* note 76; Daniel Friedman, *Destiny 2’s Latest Event is Great for Loot Boxes, Bad for Everyone Else*, POLYGON (Dec. 22, 2017), <https://www.polygon.com/2017/12/22/16811852/destiny-2-dawning-gift-armor-lantern-loot-boxes>; Nick Statt, *Bungie Announces Plans to Remedy Destiny 2’s Loot Box System*, THE VERGE (Jan. 11, 2018), <https://www.theverge.com/2018/1/11/16881358/bungie-destiny-2-eververse-microtransactions-remedy-loot-boxes>.

268. Nick Statt, *Bungie Announces Destiny 2 Changes to Address Players’ Biggest Criticisms*, THE VERGE (Nov. 29, 2017), <https://www.theverge.com/2017/11/29/16717576/bungie-destiny-2-update-controversy-weapon-armor-changes>; Dave Thier, *I Want to See What Happens When ‘Destiny 2’ is Done With its Apology Tour*, FORBES (Jan. 30, 2017), <https://www.forbes.com/sites/davidthier/2018/01/30/masterwork-armor-it-feels-like-destiny-2s-apology-tour-is-almost-over/#2ff041c74c3> (explaining the “apology tour”).

269. Chaim Gartenberg, *Apple Now Requires Games with Loot Boxes to Disclose Odds*, THE VERGE (Dec. 21, 2017), <https://www.theverge.com/2017/12/21/16805674/apple-loot-box-app-store-games-odds-probability-disclosure>.

not purchasing a game with a loot box system would be much more effective than relying on the slow-moving wheels of justice.

VI. CONCLUSION

Microtransactions may be one of the most frustrating aspects of modern video gaming. The idea of paying for additional content after a sixty-dollar purchase is already irksome, but the implementation of actual gambling psychological tricks gives one the idea that game developers and publishers do not see customers as hobbyists, but just a way through which they can make a quick profit. The loot box model is especially egregious with its parallels to gambling. Its profitability cannot be denied, but is closing off content behind random chance ethical, or even legal? The ethics can be debated, but the difficulty of proving an actual risk, the outdated case law, and the lack of precedent concerning virtual prizes makes it difficult to classify loot boxes as gambling.

While a few states have shown a willingness to bring forward legislation addressing loot boxes, the history of gambling statutes has shown, at best, a checkered pattern of reinforcement across the country. The most likely solution to the problem comes from inside the gaming community. The fact remains that loot boxes remain a lucrative business, and the calls for regulation arise only when it is a system for a game that receives negative reviews. If gamers wish to see changes in the system, they must either become engaged in discussions with figures in the industry, or disengage themselves from games containing loot boxes. While the latter suggestion may not come to fruition, the fact that the former has come about gives this author hope that players can prevent the worst aspects of game monetization, or at least make their voices heard while trying to do so. For a hobby stereotyped as containing antisocial individuals, perhaps letting others know that one has a voice is a victory in it of itself.